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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	
The State of Minnesota Petition for Declaratory Ruling Regarding the Relevance of Section 253 of the Telecommunications Act to an Agreement Governing Access to State Freeway Rights-of-Way	))))))	CC Docket No. 98-1

REPLY COMMENTS OF THE INTELLIGENT TRANSPORTATION SOCIETY OF AMERICA

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SUMMARY

The Intelligent Transportation Society of America ("ITS America") hereby replies to the comments and oppositions regarding the petition for declaratory ruling filed by the State of Minnesota through its Department of Transportation . ITS America is a nonprofit, educational association dedicated to the development and deployment of ITS to improve the safety and efficiency of the nation's transportation infrastructure. Because ITS systems are comprised of advanced communications and telecommunications infrastructure, and will involve the installation of many miles of fiber optic facilities along highways, the FCC's decision in this proceeding may have profound implications for the deployment of ITS to prepare the nation's surface transportation systems for the demands of the 21st century.

Although ITS is poised for national deployment, such deployment is occurring in a climate of restricted public resources at all levels: federal, state and local. Shared resource projects, such as that reflected in the Minnesota shared resource agreement, enable the public sector to leverage its limited resources -- financial, physical and otherwise -- to attract even greater private sector contributions. While communications capabilities are integral to ITS, the cost for these capabilities can be prohibitive to the public sector acting on its own. Thus, shared resource projects allow for a significant public investment in a right-of-way to benefit both the public and private sectors in telecommunications capacity.

Shared resource arrangements can be accomplished in many ways. The variety among contract terms in shared resource agreements executed or under consideration by numerous States results primarily from the need to accommodate local conditions that are too diverse to develop a single set of ROW access rules. Based on these examples, it appears clear that future shared resource projects will follow the lead of existing projects and continue to be

characterized by the widely varying contract terms and conditions tailored to meet the particular needs of the parties. Accordingly, any Commission decision in this proceeding must recognize and accommodate this reality consistent with the need to preserve the ability and flexibility of ITS stakeholders to rapidly and widely deploy ITS infrastructure and services.

In reviewing this matter, the Commission must first determine whether Section 253 applies to the Minnesota shared resource agreement, i.e., whether a contract executed by the State pursuant to the lawful exercise of its procurement laws constitutes state action within the purview of Section 253. If the FCC finds Section 253 applicable to the Minnesota shared resource agreement then the Commission must then apply Section 253(b) and (c) of the Act which expressly protect State action in protecting the public interest and welfare and in managing its ROW if such action is taken on a competitively neutral and nondiscriminatory basis. Only if the FCC were to find the Minnesota shared resource agreement to violate the principles of competitive neutrality and non-discrimination may the FCC then judge whether that agreement prohibits the ability of any entity to engage in the provision of telecommunications service.

Clearly, Section 253 would enable the FCC to review Minnesota's procurement laws and preempt such laws that resulted in a prohibition on entry into the provision of telecommunications services that were not otherwise excepted by Section 253(b) or (c). In other words, under Section 253 the FCC could reach State procurement laws that prohibited a specific entity or a class of entities from bidding (such as telecommunications carriers) in a procurement. However, the Commission's ability to reach and review contractual arrangements entered into between the State and private parties pursuant to the lawful exercise of its unchallenged procurement laws and procedures under Section 253 is much less certain. The Minnesota shared resource agreement is merely a contract between the state and the winner of the competitive procurement process not unlike any state' procurement of telecommunications services, such as the long-distance service procurement by which the state obtains long distance services from an interexchange carrier.

Congress expressly recognized in Section 253(b) that a State may impose, on a competitively neutral basis, such requirements as necessary to protect the public interest and welfare. There are, of course, many public safety and welfare implications to the management by a state of its roadways. Construction and maintenance areas, such as those required for the installations pursuant to the Minnesota shared resource agreement on the roadways are of particular concern as they potentially expose construction and maintenance personnel to moving traffic. In any event, the issue of what constitutes adequate and appropriate safety conditions along highways and other transportation routes simply is not within the scope of the FCC's jurisdiction. In ITS America's view, the FCC should therefore grant substantial deference to the judgment of State highway authorities regarding issues that implicate roadway safety.

For these reasons, ITS America recommends that the Commission approach its resolution of this proceeding consistent with the policy considerations presented herein. In particular, the Commission should consider the important public interest benefits identified by Congress and others that will follow from a rapid and widespread deployment of ITS facilities and services throughout the nation, and the impact that a Commission decision in this proceeding will have on both existing and planned ITS shared resource projects related to that deployment.

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State Freeway Rights-of-Way	)	

REPLY COMMENTS OF THE INTELLIGENT TRANSPORTATION SOCIETY OF AMERICA

The Intelligent Transportation Society of America ("ITS America"), by its counsel, hereby replies to the comments and oppositions regarding the above-captioned petition for declaratory ruling filed by the Minnesota Department of Transportation (the "Petition").[1] ITS America is the primary proponent of the development and deployment of intelligent transportation systems ("ITS") throughout the nation. Because ITS systems are comprised of advanced communications and telecommunications infrastructure, and will involve the installation of many miles of fiber optic facilities along highways, the FCC's decision in this proceeding may have profound implications for the deployment of ITS to prepare the nation's surface transportation systems for the demands of the 21st century.

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[1] *Public Notice* (DA 98-32, rel. Jan. 9, 1998); Reply Comment date extended to April 9, 1998, *Public Notice* (DA 98-537, rel. Mar. 19, 1998).

I. BACKGROUND

A. ITS America's Interest

ITS America is a nonprofit, educational association dedicated to the development and deployment of ITS to improve the safety and efficiency of the nation's transportation infrastructure.[2] In this capacity, ITS America serves as a Utilized Federal Advisory Committee to the U.S. Department of Transportation ("DOT") under the Federal Advisory Committee Act. In addition, ITS America has participated in proceedings and rulemakings before the FCC to help realize the implementation of policies to facilitate the deployment of ITS user services throughout the United States consistent with the mandates of the Intermodal Surface Transportation Efficiency Act of 1991.[3]

Since its inception in 1991, ITS America has provided a leadership role in the public/private partnership to deploy ITS. ITS America's members include private sector corporations involved in the provision of transportation goods and services, communications and telecommunications equipment and service providers, representatives of federal, state and

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[2] ITS, or "Intelligent Transportation Systems," uses communications, computer and information technology to make better, safer and more efficient use of the nation's physical surface transportation system. ITS technologies include electronic toll facilities where a toll can be electronically paid by a car travelling at highway speeds; computerized control of traffic signals where traffic flow can be speeded up as conditions warrant; "real time" information provided to travelers on traffic conditions; in-vehicle navigation and route guidance systems; collision warning devices and "mayday" systems that can pinpoint the location of broken-down vehicles and notify the appropriate authorities.

[3] Intermodal Surface Transportation & Efficiency Act of 1991, Public Law No. 102-240, 105 Stat. 1914 (1991)("ISTEA"). For example, in May, 1997, ITS America filed with the Commission a Petition for Rulemaking requesting an allocation of 75 MHz of radio spectrum in the 5850-5925 MHz band for Dedicated Short-Range Communications systems to be used in ITS.

municipal transportation agencies with responsibility for the deployment, oversight and management of the nation's transportation infrastructure, as well as research institutions and universities. ITS America has worked closely with DOT, its members and others to identify and develop the goals, objectives and milestones for ITS development for the next 20 years. These efforts have produced, among other things, a Strategic Plan, a National Program Plan, and a multi-volume ITS National Architecture.

B. The Minnesota Shared Resource Agreement

Under Minnesota's shared resource agreement, which was awarded under the State's procurement laws and procedures, Minnesota granted a developer ("Developer") exclusive access, for ten years, to certain state freeway rights-of-way ("ROW") for installation of fiber optic cable in exchange for provision of telecommunications capacity from the Developer's network.[4] The Developer would be the only entity permitted physical access to install and maintain the fiber optic system, but would be required to make both lit and unlit capacity available through purchase or lease to all telecommunications service providers on a competitively neutral and non-discriminatory basis.[5] The installation of the third party, or "collocated fiber," which is separate and distinct from the Developer's network, must occur at the same time as the installation of the Developer's network and be performed by one contractor

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[4] Petition at 9-11.

[5] *Id.* at 10-11.

to avoid unnecessary intrusion on the freeway ROW and the attendant safety risks and public costs.[6]

The primary uses of Minnesota's portion of Developer's network are to implement various ITS applications and to reduce existing telecommunications costs.[7] The public policy benefits behind Minnesota's implementation of ITS services, like the benefits for all states, are myriad and far ranging. For example, widespread ITS implementation will enhance the safe and efficient operation of the state's highway and roadway systems, improve environmental quality and energy efficiency, reduce traffic congestion, and improve productivity for commercial carriers and higher economic productivity overall. The benefits associated with the additional goal of reducing the State's telecommunications costs are self-evident.

The two other State public policy goals of the procurement, as stated in the Minnesota Request For Proposals ("RFP"), are extending fiber capacity to rural areas within the state and increasing competition among telecommunications providers within the State, each with discrete public benefits.[8]

C. The Minnesota Petition

In response to a challenge from the Minnesota Telephone Association ("MTA"), a private association of the State's incumbent local exchange companies, the State has asked the Commission to affirm that its proposal is consistent with Section 253 of the Telecommunications

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[6] *Id.* Minnesota's agreement in this regard is similar to the State of Maryland's shared resource project described above.

[7] Petition at 9.

[8] *Id.*

Act of 1996. Section 253(a) provides that "[n]o State or local statute or regulation or other ... requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[9] Sections 253(b) and (c) of that Act preserve states' ability to manage their ROW in a manner "necessary to" protect public safety and welfare.[10]

Minnesota asserts that § 253(a) does not apply to its proposal, which involves the creation of telecommunications infrastructure and not the provision of telecommunications service. The State bases this argument on the fact that the Developer will not provide retail telecommunications services but will provide only wholesale capacity to other telecommunication service providers. The State also claims that, even if Section 253(a) does apply, the proposal does not effectively prohibit any entity from providing telecommunications service because (a) it requires the developer to collocate fiber of other entities in the rights-of-way and to sell or lease facilities on a non-discriminatory basis, and (b) it increases competitive options overall by making available previously unutilized rights-of-way. Finally, the State asserts that its proposal is a legitimate exercise of it right to protect public safety and manage its rights-of-way by minimizing the traffic disruptions, safety threats and economic losses associated with multiple access to freeway rights-of-way.

D. Comments/Oppositions to the Petition

MTA and others assert that granting the Developer access to Minnesota's freeway ROW violates Section 253(a) of the Act. In general, they argue that Minnesota may make its

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[9] 47 U.S.C. §253(a) (1996).

[10] 47 U.S.C. §253(b), (c) (1996).

ROW available for construction of telecommunications infrastructure under Section 253, but must do so in a competitively neutral and nondiscriminatory manner, without impairing competition. They further claim that the state's agreement fails to meet this threshold because (1) it would severely impede competition in providing telecommunications services to communities along the state freeway routes by "foreclosing" a primary route into and out of those communities; and (2) even though the state's proposal was subject to an open bidding process, the RFP discriminated against many smaller companies by requiring bidders to bid for the entire state.

II. THE POLICY BEHIND THE COMMISSION'S RESOLUTION OF THE PETITION MUST BE CONSISTENT WITH THE POLICIES DRIVING THE DEPLOYMENT OF ITS

A. The National Vision for the Deployment of ITS

In enacting ISTEA, Congress envisioned the public interest benefits of the application of new technologies to the nation's surface transportation infrastructure, codifying as national policy the development of:

> a National Intermodal Transportation System that is economically efficient and environmentally sound, provides the foundation for the Nation to compete in the global economy, and will move people and goods in an energy efficient manner ... [that] shall be adapted to "intelligent vehicles"... and other new technologies wherever feasible and economical.[11]

As might be expected, the funding required to rebuild the nation's surface transportation infrastructure using ITS is significant. It has been estimated that $420 billion will be spent on ITS

[11] ISTEA, 105 Stat. 1914 (1991).

projects, products, and services in the United States by the year 2015.[12] Because States, local governments and municipalities generally lack the financial resources necessary to finance these projects, funding will consist of a creative combination of public and private participation. In particular, it is anticipated that many State ITS deployments will be funded through what are know as "shared resource" projects, of which the Minnesota project is an example. Thus, any Commission decision in this proceeding must be consistent with these important policy considerations.

B. The Role of Shared Resource Projects

Shared resources typically refer to sharing public highway rights-of-way ("ROW") for the installation of telecommunications hardware (principally fiber optic facilities).[13] In particular, these arrangements include not only telecommunications infrastructure, but also some form of compensation granted to the public sector authority in consideration for private access to the ROW. Having the public and private sectors share in each other's resource generally results in a win-win situation: the public entity receives communications equipment and capacity essential to its operations without having to purchase the equipment and services with cash,

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[12] *Intelligent Transportation Systems National Investment and Market Analysis*, Apogee Research, Inc. and Wilbur Smith Associates, May 1997 (commissioned by U.S. Department of Transportation and ITS America).

[13] DOT, through the Federal Highway Administration, commissioned a report to identify, evaluate, and analyze issues related to shared resource projects. *See Shared Resources: Sharing Right-of-Way For Telecommunications - Identification, Review and Analysis of Legal and Institutional Issues, Final Report*, DOT Report No. FHWA-JPO-96-0015, Apogee Research, Inc., April 1996 ("Shared Resources Report"). A copy of this report was attached as Exhibit 2 to the Comments of MTA.

while the private sector receives access to a valuable and limited resource, namely the ROW. This public interest is expressly recognized in Section 253 (c) of the Act.

Although ITS is poised for national deployment, such deployment is occurring in a climate of restricted public resources at all levels: federal, state and local. Shared resource projects enable the public sector to leverage its limited resources -- financial, physical and otherwise -- to attract even greater private sector contributions. As a result, the cost and time it takes to deploy ITS are both dramatically reduced. While communications capabilities are integral to ITS, the cost for these capabilities can be prohibitive to the public sector acting on its own. Thus, shared resource projects allow for a significant public investment in a right-of-way to benefit both the public and private sectors in telecommunications capacity.

While shared resource arrangements can be accomplished in many ways, the most common involves the issuance of a request for proposals ("RFPs") consistent with the State's standard procurement laws. In essence, the State is procuring telecommunications services and equipment from telecommunications vendors in the same manner as any other state government contract. The only difference is that rather than paying the vendor in cash, the State pays by providing the vendor with access to the ROW. [14]

Although only the Minnesota shared resource project has been presented to the Commission for review, shared resource projects have been deployed in numerous states and

[14] It is important to understand that the State is not receiving anything for "free." The ROW under its control is a valuable but limited resource. ROW that is offered as compensation for telecommunications equipment and services is "spent" in the sense that it is unavailable for other needs. Moreover, as trustee for its citizens, the State has a responsibility to accurately value the monetary value of access to the ROW. Thus, in existing shared resource projects, a significant effort is placed on the appropriate valuation methodology. *See, e.g.*, Shared Resources Report at 27-43.

other jurisdictions across the country. For example, such projects have been implemented in the states of California, Florida, Maryland, Missouri, New Jersey, New York and Ohio, among others.

Public/private shared resource project implementations span a wide range of approaches to sharing ROW and telecommunications equipment and services. For example, with respect to the structuring of the project and contract issues, the Shared Resources Report indicates that each project it studied evidenced different approaches to exclusivity for access to the ROW, responsibility for relocation of telecommunications infrastructure during highway improvements, and the allocation of liability among public and private partners.[15]

On the issue of exclusivity, the State of Missouri granted an exclusive easement outside the standard utility corridor through a procurement contract which was awarded to a single contractor in a competitive process, not unlike Minnesota's procedure.[16] Maryland awarded access to its ROW to two contractors. However, although technically not exclusive, the private partners have practical exclusivity because the state allows only one company to install the fiber and undertake maintenance and, for practical and safety reasons, the installation may occur only once during the contract.[17] On the other hand, the Ohio Turnpike ROW licensing agreements are expressly non-exclusive.[18]

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[15] Shared Resources Report at 55-76.

[16] *Id.* at 56.

[17] *Id.* at 57-58.

[18] *Id.* at 58.

Regarding responsibility for paying the costs and managing the relocation of infrastructure required by transportation improvements, the Missouri agreement holds the State responsible, the Maryland contract provides for a sharing of the costs, while the Ohio arrangement allocates responsibility to the private party.[19] Finally, liability for the effects of system malfunctions, accidents due to ROW work on the communications infrastructure, and breach of warranty also vary widely from project to project.[20]

This variety among contract terms results primarily from the need to accommodate local conditions that are too diverse to develop a single set of ROW access rules. Based on these examples, it appears clear that future shared resource projects will follow the lead of existing projects and continue to be characterized by the widely varying contract terms and conditions tailored to meet the particular needs of the parties. Accordingly, any Commission decision in this proceeding must recognize and accommodate this reality consistent with the need to preserve the ability and flexibility of ITS stakeholders to rapidly and widely deploy ITS infrastructure and services.

III. LEGAL ISSUES SURROUNDING SECTION 253

In reviewing this matter, the Commission must first determine whether Section 253 applies to the Minnesota shared resource agreement, i.e., whether a contract executed by the State pursuant to the lawful exercise of its procurement laws constitutes state action within the purview of Section 253. If the FCC finds Section 253 applicable to the Minnesota shared resource agreement then the Commission must then apply Section 253(b) and (c) of the Act

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[19] *Id.* at 66-67.

[20] *Id.* at 68-72.

which expressly protect State action in protecting the public interest and welfare and in managing its ROW if such action is taken on a competitively neutral and nondiscriminatory basis. Only if the FCC were to find the Minnesota shared resource agreement to violate the principles of competitive neutrality and non-discrimination may the FCC then judge whether that agreement prohibits the ability of any entity to engage in the provision of telecommunications service.

A. Is Section 253 Implicated At All?

Setting aside for the moment the shared resource component of the agreement, the process used by Minnesota in arriving at the agreement was similar to Government procurements that are routinely conducted in every state across the country. Minnesota identified a need for fiber optic capacity, issued an RFP under its customary procurement procedures to procure the capacity, evaluated competing bids, and awarded the contract in accordance with its procurement laws. This time-tested process by which a state procures facilities and services for its own use should not be at issue in the instant proceeding.[21] There is little doubt that if the state was to use the acquired capacity entirely for its own purposes, no competing telecommunications carriers would have any valid complaint regarding a violation of Section 253.[22] Thus, acquiring the capacity to implement ITS services and to reduce costs for general internal state telecommunications services are perfectly valid goals of any state telecommunications procurement and do not raise Section 253 concerns.

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[21] None of the unsuccessful bidders in the procurement has indicated that it has appealed to award of the contract to the Developer through the standard state appeals processes established for such purposes.

[22] Indeed, as noted in the Petition, nothing in Section 253 or its legislative history would prohibit Minnesota from keeping access to its freeway ROW closed to all telecommunications providers. Petition at 29.

The primary question is whether the state's use of the acquired capacity implicates Section 253. Specifically, competing telecommunications carriers (at least those within Minnesota) appear to object to the remaining two stated goals of the procurement, *i.e.*, to provide fiber optic capacity to rural parts of the state that have little or no prospect of being served, and generally to increase telecommunications competition within the state by installing additional fiber optic capacity.

However, ITS America submits that these goals, like the goals of ITS deployment and telecommunications cost reduction, also are perfectly valid goals of any state telecommunications procurement. Section 253 reaches expressly state action that rises to the level of a "statute, regulation or other legal requirement." Clearly, Section 253 would enable the FCC to review Minnesota's procurement laws and preempt such laws that resulted in a prohibition on entry into the provision of telecommunications services that were not otherwise excepted by Section 253(b) or (c). In other words, under Section 253 the FCC could reach State procurement laws that prohibited a specific entity or a class of entities from bidding (such as telecommunications carriers) in a procurement. However, the Commission's ability to reach and review contractual arrangements entered into between the State and private parties pursuant to the lawful exercise of its unchallenged procurement laws and procedures under Section 253 is much less certain. The Minnesota shared resource agreement is merely a contract between the state and the winner of the competitive procurement process not unlike any state' procurement of telecommunications services, such as the long-distance service procurement by which the state obtains long distance services from an interexchange carrier. Nothing in Section 253 suggests that Congress intended to prohibit states or municipalities from entering into contracts to procure their own telecommunications facilities and offering telecommunications services to their citizens.

Under this scenario, the only "statute, regulation or other legal requirement" that could be subject to Section 253 scrutiny, would be the state's procurement laws or a state law that permits the state or municipality to offer telecommunications services in competition with commercial telecommunications service providers. The fact that one such carrier valued the right its was awarded under the agreement more highly than another carrier is not indicative of a violation of Section 253, but instead the proper workings of the competitive procurement process.

Similarly, while it is possible that the effect of a law permitting the state to provide telecommunications services could be to prohibit the ability of a competing telecommunications carrier to provide any interstate or intrastate telecommunications service, ITS America has difficulty envisioning a situation where the mere addition of a new competitor, under this scenario the state or municipality, would have such a result.

The final question is whether the substitution of the Developer for the state in the preceding analysis alters the conclusion that Section 253 is not implicated by the Minnesota agreement. Given that the award of the contract to the Developer was the result of a presumably lawful and valid competitive bidding process under state law, it is difficult to envision why the states's decision to contract out the management of its ROW to a single entity on an exclusive basis under such circumstances changes the foregoing analysis. Again, the fact that one telecommunications provider valued the rights it received under the agreement more highly than another is simply evidence of a properly functioning bid process, not of a result that violates Section 253.

B. If Section 253 Applies, Is the Instant Proceeding the Proper Vehicle to Address the Issues?

As explained above, although only the Minnesota shared resource project has been presented to the Commission for review, there are numerous existing shared resource deployments around the country. In the Petition, Minnesota indicated that there is a need for expedited Commission guidance on the relevance of Section 253 to these projects given the large number of pending projects and the need for assurance that such projects conform with the provisions of the Telecommunications Act.[23]

As also noted above, the terms of the agreements governing existing shared resource projects vary widely from jurisdiction to jurisdiction regarding many of the relevant contract issues including exclusive access to the ROW, responsibility for relocation of telecommunications infrastructure during highway improvements, and the allocation of liability among public and private partners, among others. This variety results naturally from the fact that all of these agreements are creatures of individual State procurement processes and the need to accommodate local conditions that are too diverse to develop a single set of ROW access rules. Indeed, these conditions are no different than those recognized by the Commission in adopting its pole attachment rules imposing obligations on local exchange carriers and others

[23] Petition at 5.

who control ROW facilities to provide non-discriminatory access to all telecommunications carriers.[24]

In the *Local Competition Order*, the Commission concluded that comprehensive rules for access to ROW facilities were not possible because no single set of rules can take into account all of the issues that arise in the context of a particular installation or attachment.[25] Because the number of variables involved effectively precluded uniform standards and requirements, the Commission instead established a few rules supplemented by certain guidelines and presumptions. These general rules include (1) deference to industry safety codes and other rules including federal requirements, (2) deference to state and local requirements, which are presumed reasonable unless a complainant can show a direct conflict with federal policy, and (3) uniform application of the rates, terms and conditions of ROW access to all carriers.[26] In addition, the Commission stated that it would not adopt specific rules to determine when access may be denied because of concerns about capacity, safety, reliability or engineering.[27]

Given these factors, the Commission may conclude that in the instant declaratory ruling proceeding it would be futile to attempt to provide guidance that would have general applicability to any set of facts other than those presented in the Petition. Perhaps the most that

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[24] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, FCC 96-325, released August 8, 1996 ("*Local Competition Order*").

[25] *Id.* at paras. 1143-1149.

[26] *Id.* at paras. 1151-1157.

[27] *Id.* at para. 1158.

the Commission can conclude is that states retain primary responsibility for determining appropriate rules for access to ROW in their respective jurisdictions, subject to federal oversight, and that the Commission's responsibility is limited to cases in which a direct conflict with federal policy is demonstrated by a petitioner or complainant.[28]

B. If Section 253 Applies, Has It Been Violated?

In previous cases, the Commission has reviewed alleged violations of section 253 by asking whether there is a violation of section 253(a).[29] If it finds a violation, then the action must be preempted unless it is shown to be "competitively neutral" and "necessary" to protect the public safety and welfare under section 253(b) or a legitimate exercise of state authority to manage its public ROW under section 253(c).[30] If it is not permitted under either of these subsections, then the Commission may preempt the proposal under 253(d) "only to the extent necessary."[31]

As noted above, ITS America submits that a strong argument can be made that a state procurement of telecommunications facilities and services, conducted pursuant to a lawful,

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[28] ITS America notes that the typical manner in which concerns regarding Section 253 issues are raised is through a petition for preemption under Section 253(d) filed by an allegedly aggrieved party. In such cases, the burden of proof is on Petitioner to demonstrate a violation of Section 253(a).

[29] *See, e.g., New England Public Communications Council Petition for Preemption Pursuant to Section 253, Memorandum Opinion and Order,* FCC 96-470, File No. CCB Pol 96-11 (rel. Dec. 10, 1996), recon. denied, FCC 97-143 (rel. April 18, 1997); *Classic Telephone, Inc.*, 11 FCC Rcd 13082 (1996).

[30] *See, e.g., Public Utility Commission of Texas, Memorandum Opinion and Order*, FCC 97-346, CCB Pol 96-13 (rel. Oct. 1, 1997).

[31] *Id.*

non-discriminatory and competitively neutral procurement process, and absent a law prohibiting the state from providing competitive telecommunications services, does not implicate Section 253 at all because nothing in Section 253 suggests that Congress intended to prohibit states or municipalities from entering into contracts to procure their own telecommunications facilities and offering telecommunications services to their citizens. Moreover, ITS America also noted that it is unclear why a state's decision to contract out the management of its ROW to a single entity alters this conclusion, especially when the award of the contract was the result of a presumably lawful and valid competitive bidding process under state law.

Prior Commission discussion of this issue is limited the Commission's recent Huntington Park decision.[32] There, the Commission found an Ordinance of the City of Huntington Park, California , which prohibited payphones outdoors on private property in the City's central business district subject to certain location conditions ("Ordinance"), not to violate either Section 253 or Section 276 of the Telecommunications Act.[33] Thus, the Commission did not reach issue of whether the Ordinance was "competitively neutral" and "necessary" to protect the public safety and welfare under section 253(b) or a legitimate exercise of state authority to manage its public ROW under section 253(c).

In that case, however, the City earlier had entered into an agreement (the "Payphone Agreement") with Pacific Bell under which Pacific Bell was permitted to retain its existing payphones on public ROW and could install additional public payphones subject to City

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[32] *In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park*, 12 FCC Rcd 14191 (1996) ("*Huntington Park*")

[33] Section 276 governs payphone competition and is not at issue in this proceeding.

approval and certain conditions, in exchange for compensation to the City of a percentage of Pacific Bell's monthly revenue. Moreover, the City was permitted to allow other payphone providers to install payphones on the public ROW provided that Pacific Bell maintained at least 80% of its then installed payphones.

Although the Petitioner did not allege that the Payphone Agreement violated Section 253, and in fact apparently conceded its legality,[34] it argued that the practical effect of the Ordinance, in conjunction with the Payphone Agreement and the economics of indoor payphones, was to foreclose the ability of providers other than Pacific Bell to provide payphones in the central business district. Thus, the Commission, in dicta, reviewed the impact of the Payphone Agreement in its analysis under section 253(a) of whether the Ordinance "has the effect of prohibiting" the ability of any entity to provide payphone service in the central business district. In particular, the Commission considered whether the Ordinance "materially inhibits or limits the ability or any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[35]

The petitioner in *Huntington Park* argued that although the Payphone Agreement on its face permitted others to provide payphones on public ROW, the City had implemented the Payphone Agreement in an exclusive manner. The Commission appeared to rely on the fact that the Payphone Agreement was facially non-exclusive and that neither the petitioner nor any supporting commenter provided any evidence that the City had insisted on contract terms that

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[34] *Huntington Park* at para. 20, n. 86.

[35] *Id.* at para. 31.

would effectively prohibit other providers from installing public payphones in the public ROW.[36] Thus, the Commission found that, based on the record, it could not conclude that payphone providers other than Pacific Bell lacked a realistic opportunity to contract with the City to install payphones outdoors on the public ROW in the central business district.[37]

The instant facts are distinguishable in several ways. Most importantly, there is no ordinance at issue here, only an agreement legally arrived at pursuant to a competitive state procurement process. Thus, the issue of whether such a contract is subject to section 253 would be a case of first impression for the Commission. The Payphone Agreement in *Huntington Park* was not challenged under section 253 and, indeed, was presumed lawful by both the Petitioner and the Commission. What concerned the Commission was the potential effect of the *combination* of the Ordinance and the Payphone Agreement on the ability of other payphone providers to provide service. In the case of Minnesota, there is nothing other than the ROW agreement arrived at through a competitive and non-discriminatory state procurement process.

Second, in *Huntington Park*, there was some concern expressed that the process by which the Payphone Agreement may not have been competitively neutral.[38] Here, Minnesota's procurement process was open to any telecommunications carrier desiring to make a proposal and, indeed, some of the parties opposing the Petition in fact submitted proposals. Third, as Minnesota notes, the *Huntington Park* Ordinance involved the removal of access to

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[36] *Id.* at para. 35.

[37] *Id.* at para 36.

[38] *Id.* at n. 86.

ROW that had previously been available, whereas the Minnesota is opening up previously inaccessible ROW to use by multiple telecommunications providers.

Accordingly, although Minnesota's award of a contract to a single provider is "exclusive," it is practically non-exclusive in its implementation by virtue of the ability of any telecommunications carrier to acquire access to both facilities-based and resale capacity in the ROW on a competitively neutral and non-discriminatory basis. This, indeed, is fully consistent with the well-established and long-standing efforts of the FCC to promote competition in the provision of telecommunications services by encouraging resale of communications facilities. The shared resource agreement provisions, in effect, accomplish the objectives of Section 253 of the Telecommunications Act by ensuring that no party is *prohibited* from providing services on the right-of-ways at issue. Indeed, by the terms of the agreement, any party is permitted to provide such services. Thus, contrary the allegation of the petitioner in *Huntington Park* that the non-exclusive Payphone Agreement was implemented in an exclusive manner, Minnesota's "exclusive" agreement is implemented in a non-exclusive manner.

Under these circumstances, ITS America recommends that the Commission give due consideration to (i) the likelihood that the Minnesota agreement is not subject to section 253(a) and (ii) whether it is reasonable to conclude that the agreement "materially inhibits or limits the ability or any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" given the competitive process by which it was governed and its functionally non-exclusive and non-discriminatory implementation.

Finally, Congress expressly recognized in Section 253(b) that a State may impose, on a competitively neutral basis, such requirements as necessary to protect the public interest and